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No. 09-515

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL WEISS,

Petitioner,

v.

STEVEN SPEER, STEVEN ZWICK, JAMES ALQUIST,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN ZWICK*
Attorney at Law
JAMES ALQUIST
25909 Pala #380
Mission Viejo, CA 92691
949/699-4444
949/699-4449 FAX

Attorneys for Respondents

**Counsel of Record*

QUESTIONS PRESENTED

1. Is CCP Section 425.16 (California's Anti-Slapp Statute) unconstitutional on its face or as applied under the U.S. First Amendment made applicable in California by the Fourteenth Amendment?

2. Did the California Appeals Court unreasonably misconstrue Petitioner's causes of action, evidence, and U.S. Constitutional rights and challenges?

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INTRODUCTION

On May 28, 2009, the Court of Appeals of the State of California, Fourth Appellate District, Division Three issued their opinion regarding an appeal by Petitioner herein Michael Weiss, wherein Weiss had argued that the underlying Trial Court in the Superior Court of Orange County, California had improperly denied Weiss an opportunity to file an Amended Complaint after the underlying Trial Court had ruled that portions of a Cross Complaint by Michael Weiss were to be stricken pursuant to the California Anti-Slapp Statute (California Civil Procedure Code § 425.16(b)).

The California Appellate Court found

> allowing a slapp Plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from § 425.16's quick dismissal remedy. Instead of having to show a probability of success on the merits, the slapp plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. This would totally frustrate the legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.

(Appellate Court Ruling at p.9).

Petitioner herein Weiss sought to have the Appellate Court ruling reviewed by the California Supreme Court, however, Weiss' Petition for review was denied. (Please see p.36 to Petitioner Weiss' instant Petition for Writ of Certiorari).

Respondents herein assert that the Supreme Court of California in the case entitled *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106 (1999) has already decided that all activity protected by the litigation privilege, California Code of Civil Procedure § 47(b), including activity in anticipation of litigation, is necessarily protected by the Anti-Slapp Statute. Thus, Respondents' herein Anti-Slapp motion arises from an act in furtherance of the Respondents' right of Petition for free speech under the United States or California Constitution in connection with a public issue. (Please see California Code of Civil Procedure § 425.16(b)(1)).

For these reasons, Weiss' instant Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

On May 9, 2008, Defendant Cross Complainant MICHAEL A. WEISS, an Attorney, filed a Cross Complaint against his former client, STEVEN SPEER and against SPEER's current Attorney, Steven Zwick, and against Zwick's associate attorney, James Alquist. Mr. Weiss' Cross Complaint stems from a Complaint filed against him by Steven Speer wherein Mr. Speer

alleges Breach of Contract and Breach of Fiduciary Duty as to Mr. Weiss. Weiss had represented Speer in a case involving employment discrimination.

Speer's Complaint against Weiss alleges that Weiss grossly over billed Speer for Weiss' services and performed unnecessary services all for the purpose of incurring more attorneys' fees.

In February of 2007, Speer had contacted Attorney Zwick, Cross-Defendant herein, because Speer had lost confidence in Weiss and because Speer had a strong suspicion that Weiss was not properly handling Speer's case and was over billing Speer. Zwick had Speer's billings reviewed by an attorney who practices Employment Law because Employment was the gravamen of the lawsuit for which Weiss was representing Speer. Speer's suspicions were confirmed; that Weiss was over billing Speer and was billing for services not performed and was performing unnecessary services for the purpose of incurring more attorneys' fees. Zwick filed a lawsuit on behalf of Speer against Weiss for Breach of Contract and for Breach of Fiduciary Duty.

After a series of Demurrers by Weiss, Weiss eventually answered the Complaint and served a Cross Complaint alleging interference with economic relations and fraud against Speer, Zwick, and Alquist on or about May 9, 2008. Weiss' Cross Complaint is essentially a retaliation for the Complaint filed by Speer against Weiss.

Weiss' Cross Complaint arises from an act of Cross-Defendants Speer, Zwick, and Alquist in furtherance of Speer, Zwick, and Alquist's right of petition of free speech under the United States or California Constitution and are therefore subject to a special motion to strike, Cal. Civ. Proc. Code § 425.16(b), (Slapp Motion). Therefore, Speer, Zwick, and Alquist requested that the Trial Court strike portions of Weiss' Cross Complaint.

Weiss' Cross Complaint contains a Cause of Action for Interference with economic relation wherein he alleges that Zwick intentionally interfered with the Attorney-Client contract between Speer and Weiss by falsely saying that Weiss grossly over billed Speer. Weiss' Cross Complaint also alleges that Speer instructed Weiss to dismiss all his lawsuits and that Weiss therefore lost all existing as well as potentially recoverable attorneys' fees.

Weiss goes on to say in his Cross Complaint that Zwick induced Speer to fail to pay his attorneys' bills and therefore interfered with the economic relationship between Speer and Weiss.

Weiss' Cross Complaint also contains a cause of action for Fraud wherein he alleges basically the same thing as in the cause of action for interference with economic relation except that Zwick's assertion that Weiss was over charging Speer was not true, that Zwick had made no factual investigation, and that Zwick knew that these allegations against Weiss were false.

Weiss makes a claim for Exemplary Damages in his Cross Complaint claiming that Speer and Zwick's conduct arose from hatred and ill will towards Weiss and a desire to oppress him and with the wrongful intention of injuring him.

Cross Defendant's Motion to Strike (Anti-Slapp) asserts that Speer and Zwick are protected by the litigation privilege because Speer had every right to seek counsel if Speer believed that he was not being represented properly by Weiss. The Trial Court sustained the Anti-Slapp motion.

ARGUMENT

I

WEISS' CROSS COMPLAINT WAS A PROPER SUBJECT TO A SPECIAL MOTION TO STRIKE

A Complaint or Cross Complaint is subject to a special motion to strike if it "aris[es] from any act . . . in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). By its terms, the statue "shall be construed broadly." Cal. Civ. Proc. Code § 425.16(a). The party subject to the Slapp lawsuit bears the initial, prima facie, burden of showing that the law applies. *Equilon Enter., LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67, 124 Cal.Rptr. 2d 507, 518 (2002). That burden is met by showing

that the Slapp complaint arises from activity specified by subsection (e) which defines an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1113 (1999). For the purposes of this motion, only section (e)(2) applies: "(2) *any written or oral statement* or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;" Cal. Civ. Proc. Code § 425.16(e)(2).

Under (e)(2), **all activity protected by the litigation privilege, Cal. Civ. Proc. Code § 47(b), including activity in anticipation of litigation, is necessarily protected by the Anti-Slapp Statute:** "[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code § 47, subdivision (b), . . . such statements are equally entitled to the benefits of *section 425.16.*" *"Briggs*, 19 Cal.4th at 1115, 81 Cal.Rptr. 2d at 476 (*quoting Dove Audio v. Rosenfeld, Meyer & Susman*, 47 Cal.App.4th 777, 784, 54 Cal.Rptr. 2d 830, 835 (1996)). Moreover, if there is an 'official proceeding,' there is no further requirement that the statement be regarding a 'public issue.' When there is an official proceeding, there is a public issue." *Briggs*, 19 Cal.4th at 1117, 81 Cal.Rptr. 2d at 477.

Once the initial burden of showing the statute applies is met, the burden shifts to the party who filed the complaint (here, Cross-Complainant Weiss, Petitioner herein) to show a probability of prevailing on the merits. *Equilon*, 29 Cal.4th at 67, 124 Cal.Rptr. 2d at 518. Numerous cases have held that when the litigation privilege applies to the activity complained of, that burden cannot be met as a matter of law. See infra.

A. THE STATUTE APPLIES UNDER SUBSECTION (e)(2).

1. Speer's lawsuit against Weiss is Absolutely Privileged under Cal. Civ. Code § 47(b).

Speer's filing of his complaint for Breach of Contract and Breach of Fiduciary Duty against his former attorney, Michael Weiss, is absolutely privileged under Cal. Civ. Code §§ 47(b) and (c). The "litigation privilege" of Cal. Civ. Code § 47(b) "applies to any communication (1) made in judicial or quasi judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 50 Cal.3d 205, 212, 266 Cal.Rptr. 638, 642 (1990).

Moreover, "for well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from liability," and "it is late in the day to contend that communications with 'some relation' to an anticipated lawsuit are not

within the privilege." *Rubin v. Green,* 4 Cal.4th 1187, 1193-94, 17 Cal.Rptr. 2d 828, 831-32 (1993). **The privilege applies to "'preliminary conversations and interviews' related to contemplated action,"** *id.* at 1194-95, 17 Cal.Rptr. 2d at 832 (*quoting Ascherman v. Natanson*, 23 Cal.App.3d 861, 865, 100 Cal.Rptr. 656, 659 (1972)), and the privilege "is in no way affected by the presence of malice." *Ascherman*, 23 Cal.App.3d at 864-65, 100 Cal.Rptr. at 659. Thus, both Speer, Zwick, and Alquist are protected by the privilege.

Weiss' Cross Complaint for Interference with economic relations and fraud seeks to retaliate against Speer and Zwick for filing a complaint to seek damages against Weiss, Speer's former attorney. Speer and Zwick are absolutely privileged to file such an action and no lawsuit short of a malicious prosecution action may result therefrom.

B. WEISS CANNOT POSSIBLY MEET HIS BURDEN.

Speer and Zwick (and Zwick's Associate Alquist) have met their burden of demonstrating that the acts alleged in the cross complaint fall under protected litigation activity and the privilege set forth in Cal. Civ. Proc. § 47(c). The burden is now upon Weiss to show that there is a probability that he will prevail on his claim – not a mere possibility but a probability. Cal. Civ. Proc. Code § 425.16(b), *Equilon*, 29 Cal.4th at 67, 124 Cal.Rptr. 2d at 518.

Because the alleged statements at issue were absolutely privileged, Weiss cannot possibly meet his burden. After the *Dove Audio* court determined that the Anti-Slapp statute applied because the statements were privileged, the court turned to the question of whether Plaintiff could "establish a probability of prevailing at trial." The court had an easy answer. "[Plaintiff] did not and cannot do so in this case. As we have explained, [defendant's] communications were absolutely privileged. . . ." *Dove Audio*, 47 Cal.App.4th 777 at 784, 785, 54 Cal.Rptr. 2d 830, 835 (1996). *See also Kashian v. Harriman*, 98 Cal.App.4th 892 (2002) (plaintiff cannot prevail on his two defamation claims because activities were privileged).

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: November 25, 2009

Respectfully submitted,

STEVEN ZWICK*
JAMES ALQUIST
25909 Pala #380
Mission Viejo, CA 92691
949/699-4444
949/699-4449 FAX

Attorneys for Respondents

**Counsel of Record*